BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LANCY B. DAVIS (DECEASED)	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,972
KAW VALLEY ENGINEERING & DEVELOPMENT	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the January 14, 2014, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on May 6, 2014.

APPEARANCES

Patrik W. Neustrom, of Salina, Kansas, appeared for the deceased's spouse and dependent children. Katharine M. Collins, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties have stipulated that, pursuant to K.S.A. 44-513a and K.S.A. 59-3055, any monies determined to be due the minor child Landon Michael Davis will be deposited into a savings account or other investment account payable to the minor child on his 18th birthday, or payable to a conservator at an earlier date, if one is appointed.

ISSUES

The ALJ found claimant's death arose out of and in the course of his employment, and concluded the facts of this case are an exception to the "going and coming rule". The ALJ also concluded that while there is no evidence that the company vehicle being driven by claimant is specially equipped, the evidence does show that vehicle contained specialized equipment belonging to respondent at the time of claimant's accident.

Claimant was required to drive the company truck to various job sites daily with the equipment and another employee to do the assigned job. According to the ALJ, it is clear that travel was an intrinsic part of claimant's job and for that reason alone the claim is compensable. The ALJ relied on the Kansas Court of Appeals decision in *Halford*[1], which states that the use of a company vehicle, specially equipped for the work to be performed, is an appropriate factor to be considered in determining whether travel in that vehicle is an intrinsic part of the employment.

Respondent argues, based on *Bergstrom*[2], that the ALJ should not have applied the "intrinsic travel" exception to this claim. Therefore, as claimant was on his way to work when this accident occurred, compensation should be denied.

Claimant's counsel contends the Award should be affirmed as claimant was expected to travel to various job sites to perform his work, and to complete this work claimant had to transport materials and the crew to the job sites. Claimant's counsel argues that, at the time of the accident, claimant had assumed the duties of his employment and the accident was covered by the Workers Compensation Act. It is asserted that the weight in the back of the truck created increased risk to claimant, causing the cab to crush him and contributed to his death. It is argued claimant's work began the moment he got into his truck.

The issue on appeal is whether claimant's death arose out of and in the course of his employment.

FINDINGS OF FACT

Claimant's job with respondent was identified as either a Party Chief or Crew Chief on a surveying crew. His responsibilities included maintaining and controlling assigned survey equipment; preventing loss, damage and destruction of equipment; properly stocking the equipment needed to perform surveying jobs and traveling across the State of Kansas and occasionally into Missouri. This required claimant and his coworker to travel long distances on a regular basis. Respondent employed three crew chiefs and survey crews. Each crew chief was allowed to take an assigned truck home overnight. Job assignments for the day would be given out in the morning and would be based upon the type of experience needed for each particular job. It appeared that each truck was stocked with equipment needed to perform most jobs. However, certain equipment was kept at the office because respondent did not allow some of the more costly equipment to be left on

[1] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan.765 (2008).

[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

the trucks. Occasionally, claimant and his coworker would go directly to a job site, without need to stop at the office.

On the date of the accident, claimant was traveling south on Highway 77, approximately 14 miles north of Interstate 70, when his truck crossed over the center line of the highway and struck a northbound van head on. Claimant and the driver of the van died as the result of the accident. There were no skid marks from claimant's vehicle. There were skid marks left by the van.

Claimant's wife, Ruby Davis, saw claimant off to work the morning he died. She was making coffee and preparing his lunch while he got dressed. Ms. Davis got claimant's lunch box from his work truck in the afternoon the day before. She testified she went out to his truck every day when claimant got home to get his lunch box and Thermos. She always had to dig around for it because he would throw it in the back seat of the truck. She indicated there would be equipment in claimant's truck. She remembered seeing an orange box and a yellow box in the back seat of the king cab truck. She thought the yellow box contained the robot. She believed this was expensive computer surveying equipment, as claimant always made sure the trucks doors were locked. Claimant had so much equipment in the backseat of the truck that there was no room to sit.

Mrs. Davis indicated claimant's work took him to different towns and different locations and claimant's truck was never empty as he always had stakes, ribbon tape, hammers, nails, markers, a tripod and robot in the truck. On the day of the accident, claimant was on his way to Chapman to pick up a co-worker, Shane Marston, and head to the job site. She indicated that transporting Mr. Marston was part of claimant's job duties.

It was Mrs. Davis' understanding claimant's accident took place on Highway 77, one mile north of Milford, which is 10 minutes from the office location. They live about 50 miles north of respondent's business office in Junction City. Claimant's accident took place around 7:00 or 7:15 a.m. Mrs. Davis testified claimant left for work at the same time every day.

Mrs. Davis indicated there were times claimant was instructed to go directly to Fort Riley or Manhattan with all of his equipment in the back of his truck. Claimant was also, at times, asked to pick up coworkers who could not drive their own vehicles. Mrs. Davis testified claimant considered his truck his mobile office.

Mrs. Davis testified of possible transmission problems with the truck. But, claimant was told there was nothing wrong with the truck. Mrs. Davis testified claimant was trying to find out for himself the morning of the accident and was pulled over by a cop on his way down the road from their house. She testified respondent seldom allowed personal use of the company truck and permission had to be obtained from Leon Osbourne, the president of the company to do so.

Mr. Marston lives in Manhattan and comes in to Junction City for work. It was his understanding that, on April 16, 2012, the day claimant died, he was to meet claimant at the office in Junction City, to stock the truck and then drive to wherever their assignment was for the day. Mr. Marston indicated there were already materials on the truck, and he was simply restocking the things they needed. Materials such as flats, hubs, a pole, back sights and stakes are always on the truck as they are not very expensive.

Mr. Marston's title is a rod man. He is tasked with the grunt work and other tasks. He has worked for respondent for two years. It was claimant's job to take him to the job site, because there was only one work truck. They would meet and travel to the job site together. Mr. Marston testified it is important to have two men on a crew, especially with construction staking for blue topping. He indicated certain tasks move along faster with two people.

Mr. Marston was not sure what the work assignment was on April 16, 2012, and wouldn't know until he met claimant. He testified that most of the time he met claimant at the Junction City office, but sometimes they met in Manhattan or St. Marys. Mr. Marston testified claimant was directed to come to the office to pick him up and they would then go to the job site. Claimant and Mr. Marston worked around the State of Kansas and sometimes in Missouri. Mr. Marston testified the job duties included traveling to remote sites to perform survey work and transporting the proper equipment was part of the job.

Mr. Marston testified the work day begins at 7:00 a.m., except in the winter when they begin at 7:30 a.m. He testified that on the day of the accident, claimant was running late. He testified claimant always had the equipment on the truck. He also indicated when on the job commuting long distances in the truck, with tools and instruments, is a part of the job.

Mr. Marston testified that before the accident, claimant mentioned the truck he was driving had been shifting weird in first or second gears. Mr. Marston testified that he also noticed this and claimant had to let the truck warm up first. Mr. Marston testified claimant took the truck to an auto shop to be looked at, but nothing was found. However, when he got the truck back and it was warmed up, it continued to do the same thing. Mr. Marston didn't know any of the mechanical history of the truck.

Claimant's son, Lance Davis[3], was the first to be contacted about his father's accident. It was his understanding that his father and some others were involved in an accident on Highway 77.

Lance testified claimant used a company truck for his work and, because it was a long commute, he carried equipment on the truck in case he needed to bypass the office

[3] Lance is 18 years old and plans to attend Bellus Academy in Manhattan, Kansas.

and go straight to the site. He testified that should claimant need the truck for personal use he would need to seek permission from the office. The truck was only used one time for personal reasons, when claimant moved. Every other time claimant used his personal vehicle.

Lance knew about claimant's job because, when he was younger, he would occasionally ride along. He knew the equipment, but did not know how to use any of it. He indicated claimant had to have special training to operate it. He testified claimant was required to keep a computer to scan elevations, to pick up satellites, and anything from prisms to whatever else was needed to do the job. Based on his knowledge, claimant was able to drive directly to a job site with all of the equipment in the truck.

Lance had not talked to claimant on the day of the accident. He had the opportunity to view pictures from the accident and identified the debris as items claimant had in the back of his truck to perform his work. He testified that, on occasion, claimant also brought batteries from the truck into the house to charge them.

Lance acknowledged that before the accident, the truck claimant had been driving was having transmission issues. He testified the transmission would skip out at highway speeds. He testified that in the morning claimant would travel from Palmer to Junction City to pick up Mr. Marston and then onto the job site. He testified Mr. Marston was always picked up on the way in to work.

Joshua Junghans, manager of Surveying Services and claimant's immediate supervisor, testified his job duties included scheduling crews with contractors and clients, reviewing surveys, signing surveys and assisting in performance reviews. Mr. Junghans testified there are three survey crews and they travel around wherever they are directed. It is typical to provide a crew chief with a truck that includes tools and equipment required to take to the job site. He testified the company has five trucks like the one claimant was driving at the time of the accident. Each crew chief is allowed to take their assigned truck home overnight if they want as long as they have it when assignments are given out. They are also assigned a cell phone. There is no twenty-four seven call. Claimant had not used his company issued cell phone on the day he died. It was used the day after his death to call the office, but Mr. Junghans doesn't know who used it or why.

Mr. Junghans testified job assignments for the day are given out in the morning and are based upon what type of experience is needed for each particular job. Mr. Junghans indicated claimant's job included maintaining and controlling assigned survey equipment, taking measures to prevent loss, damage and destruction of equipment, and to ensure the survey vehicle is properly stocked with the equipment needed to perform the job. He also testified there were items claimant would not have had on his truck regularly because the company only had a small amount of those items. Mr. Junghans testified that one of the agreements claimant signed allowed him to drive his truck to and from his house. The

agreement held respondent would not pay for personal commute miles, and any miles incurred for personal use had to be paid for by claimant.

Mr. Junghans regarded claimant as a good worker. He testified claimant was an hourly worker, whose wage started when he arrived at the office. Mr. Junghans confirmed claimant was required to pick up Shane Marston for work. He was aware of times where claimant would pick up Mr. Marston and travel directly to the job site. He wasn't aware of when claimant's pay would start on those occasions, but he assumed it started when claimant picked up Mr. Marston. Mr. Junghans indicated the job site location could change daily or weekly, so travel is an important part of the job. He later testified that claimant would not have been able to drive directly to a work site because he would need to pick up the bigger, more expensive equipment for the job as those are not allowed to be left on the trucks. He then indicated that if claimant and Mr. Marston were to go directly to a job site, arrangements would have been made in terms of what equipment would be needed for the job. So, if the location of the job and the job itself did not require certain equipment from the office, there would be no need for claimant to come into the office. No equipment is left at any of the job sites. Most of the jobs are within a days driving distance, so the crews are able to return each night.

Mr. Junghans testified he had no idea what claimant was doing the morning of the accident. It was Mr. Junghans' understanding that claimant was coming into the office on the day of the accident. He had no idea why claimant wasn't there on time. He did not know of any problems with the truck claimant had been assigned.

Mr. Junghans indicated that, although he knew claimant lived in Palmer, he couldn't say if that was where claimant had been coming from. Claimant had issues with tardiness and had been counseled. On the day of the accident, claimant would have been considered late as the accident occurred around 7:19 a.m., and claimant was to be at work at 7:00 a.m. Mr. Junghans is aware of what equipment was recovered at the scene of the accident.

Clayton Hardaway, a trooper with the Kansas Highway Patrol, testified that at the time of claimant's accident he had been through intermediate accident training twice, once with the Police Department and once with Highway Patrol, including basic accident training once with Highway Patrol and advanced accident training once with Highway Patrol. This training teaches everything from filling out an accident report to documenting scenes, to determining what caused the accident and drawing the scene. In his five years in law enforcement, Trooper Hardaway has handled over a hundred accident scenes.

Trooper Hardaway does not dispute that claimant was the principal cause of the April 16, 2012, accident. He indicated that although the autopsy report did not indicate claimant's tolerance to the medication in his system, there was the suggestion that he may have been impaired.

Trooper Hardaway indicated the autopsy report shows claimant died of blunt force trauma. It was determined claimant was going south and the other vehicle was going north. However, it appeared both vehicles flipped around and ended up in the opposite direction from the way they had been headed. Trooper Hardaway testified there was a tripod at the scene which was photographed.

Trooper Hardaway testified the debris in photo 7 came from claimant's truck. Trooper Hardaway testified due to the lack of braking in the accident, he did not believe the equipment in the back of claimant's truck contributed to the possible injuries or blunt force trauma to claimant. He did feel that it increased claimant's risk of injury and death in the head-on accident. He also testified there is no way of knowing if claimant had all the equipment he needed with him at the time of the accident. Trooper Hardaway testified claimant was going about 70 miles per hour. He did not know how fast the van was going, but indicated the van showed significant braking prior to the crash as if trying to avoid the crash. There were 8 people in the van.

The accident report indicates there were no adverse weather or road conditions. The report indicated both vehicles were trying to negotiate a curve in the road and for unknown reasons claimant's vehicle crossed the center line and collided with the other vehicle. The report also indicated claimant may have ingested medication that contributed to the accident. There were no skid marks from claimant's vehicle and the report indicated claimant had not been wearing his seatbelt. However, the autopsy report indicated that some of claimant's injuries were consistent with the use of a lap belt. Therefore, he may have had his seatbelt connected.

Pursuant to the autopsy report from Parcells Regional Forensic Services, the cause of claimant's death was found to be blunt force trauma to the head, chest, and abdomen from the accident. It was concluded in the report that claimant's use of tramadol and hydrocodone could have interfered with his ability to drive and was a contributory factor to the cause of the accident.[4] However, this issue was not presented to nor decided by the ALJ and has not been brought before the Board.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

[4] Hardaway Depo., Ex. 4.

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(3)(B) states:

> (B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

In order to receive workers compensation benefits, a claimant must show that his or her accidental injury arose out of and in the course of employment. However, an accident is not considered to arise out of and in the course of employment, if it occurs while the employee is on the way to assume the duties of employment or after leaving the job. This is referred to as the “going and coming rule”. The rationale for the “going and coming rule” is based upon the premise that while an employee is on the way to work or leaving work, he or she is subjected to only the same risks or hazards as the general public. Thus, an employee is denied compensation if his or her injury is encompassed by the “going and coming rule”.

There are statutory exceptions to the "going and coming rule". If the worker is on the premises of the employer, on the only available route to or from work, which is a route involving a special risk or hazard and is a route not used by the general public except in dealings with the employer, or the employee is a provider of emergency services and is responding to an emergency.

Here, claimant was not on respondent's premises, was on a route utilized by the general public and not exclusive to respondent and was not an emergency services responder. Claimant's counsel does, however, contend that a special risk or hazard existed in this instance, i.e., the fact claimant was carrying several heavy pieces of equipment in the company vehicle which contributed to the severity of the accident when the crash caused the equipment to move forward with tremendous force and velocity. The cab of the company vehicle was severely damaged by the force of this equipment striking the front of the pickup bed. However, the ALJ did not address that issue in the Award.

An exception to the "going and coming rule" that was addressed by the ALJ involved when travel is an intrinsic part of the employment. "[W]hen the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer" the "going and coming rule" does not apply.[5]

However, the Kansas Court of Appeals has approached this exception to the "going and coming rule" from a different angle. Rather than referring to the "going and coming rule" as an *exception* to the statutory limitations, the Court identified intrinsic travel as a situation where the employee had already begun the essential tasks of the job. In *Halford*[6], Judge Leben, in a concurring opinion, stated:

> Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment" --he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the "going and coming rule."

The Court in *Craig*[7], determined that "it appears the analysis is really whether travel has become a required part of the job such that the employee actually assumes the duties of employment from the moment he or she leaves the house and continues to fulfill the duties of employment until he or she arrives home at the end of the workday." The *Craig* Court went on to determine that "the inherent travel exception to the going-and-coming rule

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[5] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

[6] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

[7] *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 168, 247 P.3d 650 (2012), *rev. denied* May 20, 2013.

is not an exception to K.S.A. 2010 Supp. 44-508(f) at all, but a method to determine whether an employee has already assumed the duties of employment when he or she is going to or returning from work."[8] Interestingly, the Court cites the Kansas Supreme Court's decision in *Sumner*[9]. However, the Supreme Court, in *Sumner,* still refers to integral travel as being an "exception" to the going-and-coming rule.[10] And, in a more recent decision, the Supreme Court continued to describe intrinsic travel as being an "exception" to the "going and coming rule".[11]

Judge Leben's concurring opinion, in *Halford,* creates a new way of looking at the going-and-coming rule and intrinsic travel. That logic holds the rule will not apply to situations where an employee begins work from the moment he or she gets into his or her vehicle and continues until the person is returned to his or her home.

In this instance, the claimant was driving a company truck, used exclusively for work, carrying expensive company equipment, which apparently remained exclusively in claimant's possession. The assigning of the trucks to the party chief or crew chief appears to be a benefit to both the employer and employee. Time is saved by having the crew chief maintain the truck and equipment and allows the charging of battery operated equipment at night. Additionally, the crew chief may proceed directly to a work site, if necessary, having the required equipment in his possession with the truck.

As noted by the ALJ, this situation is very similar to *Halford,* where the deceased claimant was driving from his home to pick up "his lead man", before stopping by the respondent's yard to pick up supplies for the current job site. Before reaching the "lead man" the truck drifted off the road and Halford was killed.

Here, claimant was proceeding to respondent's office, to pick up both his co-worker and any necessary equipment before proceeding to the job site. This was a customary arrangement between claimant and respondent, beneficial to both. The determination by the ALJ that travel was an intrinsic part of claimant's job is well reasoned and the Board affirms same. As noted above, the ALJ noted the issue dealing with the special risk or hazard exception to the going-and-coming rule, but reached no decision on that issue. The above finding renders a decision on that issue moot.

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[8] *Id.*

[9] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 144 P.3d 668 (2006).

[10] *Id.* at 289.

[11] *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890 (2012).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Travel was an intrinsic part of claimant's employment with respondent. The award of benefits by the ALJ was proper under the circumstances.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated January 14, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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